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CONTENTS.

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We have read with considerable interest a pamphlet written by James C. Courtney, of Metropolis, Ill., upon the subject of the evils of the "assignment system," as practiced by the Supreme Court of Illinois. The occasion of its publication is that a certain Eastern law journal has frequently called attention to what it claims to be the fact, that the opinions of the Supreme Court of Illinois are less satisfactory and less cited than the opinions of any of the State courts of the same importance. It does not seem to be the purpose of this pamphlet to defend the Supreme Court of Illinois, or to combat the truth of this statement. That some of the opinions of this court are quite unsatisfactory and inconsistent, the author admits; and that the court needs no defense is equally true. At the time of the attacks upon it by the law journal in question, we took occasion to combat its view, in so far as it decried the ability and learning of the court. The object of this pamphlet is to show that the cause of some of the inconsistencies of the court is the product of a vicious system. The Supreme Court of Illinois discourage oral argument and practice the "assignment" or "committee" system, and herein he contends, with plausible reasoning, lies the evil. The cases are distributed to committees composed of two or three judges for determination. Each committee examines the cases given to it and recommends a reversal or affirmance, as the case may be. With this recommendation the cases are assigned to single judges of the committee to be written, and each judge takes the abstract of the record and the briefs in the cases assigned to him to his home, and writes opinions to suit himself. After the opinions have been written the court convenes for consultation, and each judge reads to the full court the opinions written by himself. A majority of the other judges have never heard of the case before, are ignorant of the facts, have never investigated the law, are even without the advantages of an oral argument to impress the frictional points in the case. It is evident that the reading of the opinions under such circumstances is perfunctory, a mere matter of form, productive of nothing but confusion in the minds of the judges who have no knowledge of the facts and are ignorant of the pivotal points of the case. It is believed that opinions turned out in this way are not deliberate conclusions of the court. Formal assent is not deliberate consideration. Under this practice the inconsistency in opinions usually occurs with reference to fundamental questions, as the oversight of a constitutional provision, or a statute enactment, or a disregard of elementary principles—errors of inattention simply.

As an instance of this inconsistency, it is claimed that the case of Ferguson v. The People, 90 Ill. 510, is in direct conflict with the constitution of the State, and in the teeth of the case of Isett v. Stuart. All that was necessary to have prevented the error was a little investigation and reference to the constitution. And so of the case of Huls v. Buntin, 47 Ill. 396, where the court overlooks the statutory provision, a statute which had been in force for twenty-nine years. The author calls attention in this connection, also, to the case of Skidmore v. Brinker, 77 Ill. 166, where he contends that the court not only overlooked an elementary principle of the common law, but overrules three or four well-considered cases of the same court without referring to them. The appellate court, in Comisby v. Breen, 7 Bradw. 369, refuses to follow the rule laid down in the Skidmore case, stating that the supreme court did not mean what it said.

The author asks what explanation shall be given of the opinion in the case of Ransom v. Henderson, 114 Ill. 528, an "opinion that runs counter to at least fifty decisions of the same court." He thinks it a wonder how this opinion ever passed even on a hasty reading. In that case it was held that a tax deed alone was *prima facie* evidence of title, when the settled doctrine of the court had been for many years that a tax deed was absolutely void unless supported by a valid judgment, precept and notice. In this connection attention is called to the fact that no judge of the Supreme Court of Illinois ever made a more inexcusable oversight than did

Chief Justice Shaw in the case of Elliott v. Stone, 1 Gray, 571, as his opinion in that case is in the teeth of another opinion written by him in the same case, decided one year before, between the same parties on the same state of facts, and no reference is made in the last one to the former case whatever. Elliott v. Stone, 12 Cush. 174. This remarkable oversight affords quite conclusive proof to Mr. Courtney that a similar practice prevailed in the Massachusetts court at that time, which obtains in the Illinois court now. For it does not stand to reason that that court would have decided a point both ways in the same case within a year, had the case been argued orally and considered by each judge independently of his associates.

But discordance of opinions is not the only evil resulting, he contends. Where opinions are hurriedly read and adopted in this way, the court is often committed to the conceits and fancies of a particular judge. The truth of this observation he illustrates by a reference to some of the opinions of the late Judge Sidney Breese, who "never neglected an opportunity to disparage woman or publish her shortcomings to the world." As an instance of this, he cites Albrecht v. Walker, 73 Ill. 69. And thus one bold judge, with strong prejudices, carrying his feelings into his opinions, can easily impose upon the court. He cites Cothran v. Ellis, 125 Ill. 476, as an illustration of the point that under the laxity and temptation of this system the most conservative judge is sometimes betrayed to express his feelings too freely. It is undeniable that such extravagance of statement in judicial opinions make unsafe precedents, and where cases are decided in this way, confidence in the court is weakened by a feeling of distrust that the cases have not received a thorough investigation. It was Lord Eldon who said, in one of his opinions, that it was as important to satisfy the parties that the case had received a thorough investigation as to decide it correctly. Besides all these reasons, the author believes that the perpetuation of bad precedents is in a great measure due to this haphazard way of deciding cases —a judge following some old precedent without investigating the reasons upon which it was founded.

The remedy for the evils suggested is oral argument and the abolition of the assignment system. Oral argument is undoubtedly a great auxiliary in revealing the weak and strong points in a case. It places the court in the atmosphere of the trial, and directs with unerring certainty to the pith and marrow of the contention. The Court of Appeals of New York encourage oral argument. The Supreme Court of the United States demands it. Seldom is a cause submitted to the latter court without an oral argument, and when submitted each judge, separately from the others, makes a thorough examination of every case. The case is then considered by all the judges together, and when the conclusion is reached the opinion is given out to be written, and when written it is submitted to the full bench for approval. The same practice, we are told, prevails in many of the courts of the States and in the appellate courts of England. In Kentucky, Alabama and Illinois it is said the assignment system alone prevails.

There is considerable truth and good sense in the view of the author of this pamphlet. It may be said, however, that it will be difficult for the Supreme Court of Illinois to adapt itself to the better method until the docket of that court, already crowded, is relieved and the judges given more time for the preparation of opinions. Besides this, the practice in that State of holding the terms of the court at three different points, far distant in the State, stands somewhat in the way, as much of the time of the court which could be used for deliberation and study is consumed in going to and fro, coupled with many other annoyances which interfere with their work. In our judgment, the fault lies very largely with the people and legislature of that State.

NOTES OF RECENT DECISIONS.

BAILMENT—STOREKEEPER—CARE OF CUSTOMER'S PROPERTY.—It is decided by the Supreme Court of Pennsylvania, in Woodruff v. Painter, that where one entering a clothing-house for the purchase of a suit deposits his watch, at the direction of his salesman, in a drawer, preparatory to trying on some clothes, the jury are warranted in finding that such deposit is a necessary incident of the business, in which case the clothier becomes a

bailee for hire, bound to exercise ordinary diligence. The customer, in an action against the clothier for the value of the watch, proved that it had not been returned to him; that, after he had purchased the suit, the salesman looked for the watch to return it, but it was gone; that the clothier sent for and examined without result several persons, not employees, who had been in the store. It was held that plaintiff was entitled to have the case submitted to the jury, defendant, however, not being liable if the jury found as an inference from the facts that the watch was stolen, unless they further found defendant had not exercised ordinary care. Heydrick, J., says:

When the defendants opened a retail clothing store they thereby invited the public to come into their place of business and purchase clothing in the usual manner; and when they extended this invitation they assumed some duty to the people who should respond to it. Even the householder who permits the use of a path leading to his house is deemed to hold out an invitation to all people who have any reasonable ground for coming thither to pass along his pathway, and is therefore held responsible for neglecting to fence off dangerous places. 1 Add. Torts, 203. So, too, a shopkeeper is liable for neglect on leaving a trapdoor open without any protection by which his customers receive injury. Parnaby v. Canal Co., 11 Adol. & E. 223. In like manner it cannot be doubted that, if these defendants had maintained or permitted a danger of any kind in their store, and by reason of it the plaintiff had sustained bodily injury, they would have been answerable to him for the consequences. In such case they would be said to have been guilty of negligence,—guilty of a neglect of a duty which they owed to the customer; but I apprehend that the duty neglected would arise from an implied contract that, if customers would come to their store, no harm that could reasonably be averted should overtake them, and the consideration for such promise would be the chance of profit from their patronage. Upon principle the contract must be held to extend to the safety of such property as to the customer necessarily or habitually in pursuance of a universal custom carries with him. Whatever thus necessarily, or, in common with people generally, he habitually carries with him and must necessarily lay aside in the store while making or examining his purchases, he is invited to lay aside by the invitation to come and purchase, and, having laid it aside upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And, this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon him; it would be part of the transaction in which he is authorized to represent his employer. This much was assumed without question in Bunnell v. Stern, 122 N. Y. 539, 25 N. E. Rep. 910, a case differing from the present in this only; that the article lost was a lady's cloak, and the saleswoman took no care whatever of it.

Assuming that the jury would have found that a watch is such personal belonging as men usually carry with them, and that in the selection of a suit of clothes it is necessary or usual to remove it from the person, and lay it aside; and, further, that the plaintiff, by direction of the defendants' salesman, placed his watch in a designated drawer in the store, preparatory to the selection of a suit of clothes, to purchase which he visited the store,—the defendants thereby became chargeable as bailees. The principles which govern that relation are briefly and clearly stated by Judge Story, in his work on Bailments, thus: "When the bailment is for the benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight neglect. When the bailment is reciprocally beneficial to both parties, the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Manifestly the bailment, in a case like the present, is of the latter class, for, while the customer pays nothing directly, *eo nomine*, for the safe-keeping of his effects, the dealer receives his recompense in the profits of the trade of which the bailment is a necessary incident. It was upon this principle that Lord Holt said, in Lane v. Cotton, 12 Mod. 483, an action was sustainable against an inn-keeper for the loss of a guest's goods, and that the court of appeals affirmed the judgment of the court of common pleas of the city of New York in Bunnell v. Stern, *supra*. In Massachusetts the proprietor of a liquor store, who permitted an order slate for an expressman to be kept in his store, and allowed people to leave packages there to be taken away by the expressman, was held to be a bailee for hire on the theory that what he thus permitted brought him an increase of business. Newhall v. Paige, 10 Gray, 366. This, however, would seem to be pushing the principle to a dangerous extreme; it would render it unsafe for any business man to allow another's property to be left about his premises, and would be in seeming conflict with our own case of Bank v. Graham, 79 Pa. St. 106, and De Haven v. Bank, 81 Pa. St. 95. The safer rule is to hold a bailment to be for hire when no hire is paid in such cases only as it is a necessary incident of a business in which the bailee makes profit; and such the jury might have found the present case to have been.

The remaining question is whether, upon the assumption that there was a bailment for hire, proof of failure of the defendants to return the watch and chain upon demand was, under the circumstances, sufficient to carry the case to the jury. If what was said by the plaintiff should be taken as proof that the property was lost, we would be met with a conflict of authority elsewhere as to the effect of it, and find little in our own books to help us determine whether the burden was upon the plaintiff to prove negligence, or upon the defendants to repel the inference of it. But the plaintiff's evidence amounts to no more than that the salesman examined the drawer in which the watch had been placed and some others, and did not find it, and that several persons, not employees, of the defendants, who had been in the store and left, were sent for and interrogated without result. All this did not prove a loss, nor even that the defendants said the watch was lost or had been stolen. In Logan v. Mathews, 6 Pa. St. 417, it was held that if a bailee for hire return the property in a damaged state, and give no explanation how the injury happened, the burden of proof to show that there was no negligence is upon him. In harmony with this judgment, a bailee who fails to give any such explanation of his neglect to re-

store the property intrusted to him as will enable the bailor to test his good faith ought to be held to proof that he has exercised ordinary diligence in the care of it. Doubtless the defendants were entitled to the benefit of any inferences fairly deducible from their conduct when the watch was demanded, but such inferences were for the jury. If the case had been submitted to them, and they had found as an inference from the facts proved that the watch had been stolen, such finding would have been a complete exculpation, unless they further found that the defendants had not exercised ordinary care.

THE CASES IN WHICH THE FEDERAL COURTS DO, OR DO NOT, FOLLOW STATE DECISIONS IN MATTERS OF SUBSTANTIVE LAW.

1. *Introductory.*—The scope of the present investigation will be confined to ascertaining what rules of substantive law, when once enunciated by the State courts, thereby become binding upon the federal courts sitting in such State. Rules of adjective law, such as pleading, practice and evidence, do not come within the scope of this article. The aim here is to state those classes of cases in which the federal courts have held themselves bound to follow the decisions of the State courts, and also those in which they have held themselves not bound so to do.

2. *The Statute.*—The doctrines relating to this subject are to be found in the 34th section of the judiciary act of 1789, which is literally re-enacted in section 721 of the Revised Statutes of the United States, and in the decisions of the federal courts construing that act. The statute in question is as follows: "The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

3. *To What the Statute Extends.*—It will be observed that the statute provides for rules of decision only in trials at common law. This excludes on the one hand criminal trials, and on the other, suits in equity and in admiralty.[1] The only crimes that can be tried in the United States courts are statutory and not common law crimes. This, although not referred to in the decisions, is the only apparent reason for the holding of the courts construing this statute not to include criminal trials. In Reid v. United States,[2] the question was whether a Virginia statute, relative to the admissibility of evidence in criminal trials, was binding upon the federal courts sitting in Virginia, and it was held that it was not, because the statute above quoted only applied to civil cases at common law. The term common law, in the above statute, seems to be used in its most technical sense; that is, as distinguished from equity. Hence, it has been decided that federal courts are not bound to follow that decision of State courts of a State in which they are sitting upon questions of equity jurisprudence.[3] In the case of Reid v. United States, *supra*, Taney, C. J., said: "The language of the 34th section of the act of 1789 cannot, upon any fair construction, be extended beyond civil cases at common law, as distinguished from suits in equity." The relative jurisdiction of courts of equity and of law, or, in other words, the question as to whether a given case shall be brought in equity or at law, is not determined by the laws of any State even for federal courts sitting in those States, but that question is to be determined by the principles of common law or equity as distinguished and defined in that country from which we derive our knowledge of those principles.[4] For example, the practice of allowing ejectments to be maintained in State courts upon equitable titles cannot affect the jurisdiction of the courts of the United States;[5] and an equitable title or an equitable defense, though allowed to be set up in a State court, cannot be set up in an action at law in the federal courts in the same State, but must be made the subject of a suit in equity.[6] It is

[1] Bucher v. Cheshire Ry. Co., 125 U. S. 555.
[2] 12 How. 361.
[3] Neves v. Scott, 13 How. 268.
[4] Robinson v. Campbell, 3 Wheat. 212. See Potts v. Insurance Co., 35 Fed. Rep. 566; White v. Bower, 48 Fed. Rep. 186.
[5] Sheldon v. Cordova, 24 How. 423; Fenn v. Holmes, 21 How. 481.
[6] Ridings v. Johnson, 128 U. S. 212, 9 Sup. Ct. Rep. 72, 74; Church v. Spiegelburg, 31 Fed. Rep. 601; Hurt v. Hollingsworth, 100 U. S. 100.

thus to be seen that the statute extends only to civil cases at common law. It does not, however, it is said, extend to all such cases, but only to those where the jurisdiction depends upon the citizenship of the parties.[7]

4. *The Term "Laws."*—It is next necessary to determine what is meant by the term "laws," as used in the statute given above, in order to determine what decisions are considered binding as laws under this act. In Swift v. Tyson,[8] which is a leading case upon most of the principles involved in the present discussion, when speaking of the word "laws," as occurring in the 34th section of the judiciary act, Story, J., said: "In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. * * * In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local; that is to say, to the positive statutes of the State and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature and character." From this it is apparent that there are three classes of laws covered by the statute, viz.: (1) Statutes; (2) Decisions construing statutes or constitutions; (3) Decisions establishing rules of real property. Whether subsequent decisions have extended the statute to another class of cases will be noticed hereafter. With the first we are not concerned in the present discussion. To the second and third, and the doctrines growing out of them, our attention will chiefly be confined.

5. *Construction of State Statutes.*—Upon the first of the two latter divisions there are numerous decisions which, with some qualifications to be hereafter mentioned, invariably hold that the decisions of the highest court of a State, construing the statutes or constitution of that State, are binding upon the federal courts sitting in that State when the like question comes before them.[9] In Leffingwell v. Warren,[10] the court, by Justice Swayne, said: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of such statute, and is as binding upon the courts of the United States as the text." Such decisions of the State courts are to be followed according to the strict principles of the maxim *stare decisis*. The federal courts will not rest their opinion upon an opinion of a State court concerning the construction of a statute of a State, if it was not necessary to construe the statute in order to decide the case. Under such circumstances the question of construction will be examined by the federal courts and decided as seems to them right.[11] A State court, to make such a binding construction, must expressly ground its decision upon the statute; for, "in a case arising under a State statute, what the court assents to as a general proposition, and not that the statute so declares, will not be binding upon the federal courts as a construction of a statute."[12] There is a limitation to the above doctrine; that is, the construction must not be in conflict with the federal constitution or statutes.[13] There is also a single exception; that is, where the federal courts are called upon to construe the contracts of States which have been made in the form of laws; the construction put upon such laws by the State courts will not be binding upon the federal courts.[14]

6. *Special Statutes.*—The question that here presents itself is whether or not the rule last mentioned extends to the decisions of State courts construing special statutes. Upon this subject there seems to be a diversity of opinion in the Supreme Court of the United States. In the case of Smith v. Kernochen,[15] the construction of an act of the legislature of Alabama chartering a corporation became necessary. There had been State decisions

[7] Schrieber v. Sharpless, 17 Fed. Rep. 589.

[8] 16 Pet. 1.

[9] Thatcher v. Powell, 6 Wheat. 119; Luther v. Borden, 7 How. 1; Nesmith v. Sheldon, *Id.* 812; Van Rensselaer v. Kearney, 11 How. 290; Jefferson Branch Bank v. Skelly, 1 Bl. 436; Nichols v. Levy, 5 Wall. 433; Bacon v. Insurance Co., 131 U. S. 258; Burgess v. Seligman, 107 U. S. 20; Enfield v. Jordan, 119 U. S. 680; Jencks v. Quidnick, 10 Sup. Ct. Rep. 655; Union Nat. Bank v. Bank of Kansas City, 10 Sup. Ct. Rep. 1013; Hancock v. Louisville & N. Ry. Co., 12 Sup. Ct. Rep. 969.

[10] 2 Bl. 599.

[11] Carroll v. Carroll's Lessee, 16 How. 275.

[12] Town of Venice v. Murdock, 92 U. S. 494.

[13] Murrey v. Gibson, 15 How. 421.

[14] Jefferson Branch Bank v. Skelly, 1 Bl. 436.

[15] 7 How. 198

construing the statute, and the court said: "It belongs to the State courts to expound their own statutes; and when thus expounded the decision is the rule of this court in all cases depending upon the local laws of this State. Subsequently, in Williamson v. Berry,[16] this decision was ignored and a different rule enunciated. The court, by Justice Wayne, there said: "We cannot admit that the rule hitherto observed in this court of recognizing the judicial decisions of the highest courts of the State upon State statutes * * * comprehends private statutes or statutes giving special jurisdiction to a State court for the alienation of private estates. It has never been extended to private acts relating to particular persons." Ten years after this latter decision the case of Maxwell v. Moore[17] came up for hearing. A special act of the legislature of the State of Arkansas had been passed authorizing a certain administrator to convey land to a particular person. The case turned upon the construction of this act. The Supreme Court of Arkansas had decided the question. The federal supreme court said: "That the special act authorizing the administrator to make a valid deed and divest the title of the heirs, was decided in this case by the Supreme Court of Arkansas, and which decision on the effect of the State law is conclusive on this court." It would appear from this that the weight of authority as well as the later authority is in favor of extending the rules to special statutes.

7. *Rules of Property.*—The next class of decisions which have been held to be binding upon the federal courts are those which establish rules of property. Where in any State there is a settled line of decisions establishing a principle that is a rule of property, these decisions are binding upon the federal courts sitting in that State.[18] These State decisions establishing rules of property need not be based on any statute in order to be binding upon the federal courts.[19] As to what is meant by rules of property, in the case last cited, Justice Miller said: "By rules of property is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto." As to whether or not the term "rules of property" includes only real property, or also includes personal property, may be hard to determine from the language of the courts. In the earlier cases the language did not extend the principle beyond the rules of real property.[20] But later the decisions would indicate that the doctrine extended further.[21] An example of the extension of the doctrine beyond the rules of real property is the case of Ohio v. Frank,[22] where the supreme court of the State had decided as to the rate of interest on contracts, after maturity, and the Supreme Court of the United States held that such decisions of the State courts were binding upon the federal courts.[23] Still, the principle has special application to rules of real property.[24]

8. *Bucher v. Cheshire Ry. Co.*—In the case of Bucher v. Cheshire Ry. Co.,[25] decided in 1887, the obligation of the federal courts to follow State decisions was said to extend to a class of cases to which it had never before been extended. The plaintiff in that case brought suit on account of personal injuries received while traveling on defendant's railway on Sunday. The State courts of Massachusetts, in which State the case arose, had held that the fact that the injury occurred while the plaintiff was traveling on Sunday was a good defense to such an action, there being a statute in that State prohibiting Sunday travel. The United States Supreme

[16] 8 How. 495.

[17] 22 How. 145.

[18] Jackson v. Chew, 12 Wheat. 153; Swift v. Tyson, 16 Pet. 1; Suydam v. Williamson, 24 How. 427; Bucher v. Cheshire Ry. Co., 125 U. S. 555.

[19] Jackson v. Chew, *supra;* Bucher v. Cheshire Ry. Co., *supra.*

[20] Jackson v. Chew, *supra;* Swift v. Tyson, 16 Pet. 1; Suydam v. Williamson, 24 How. 427.

[21] Chicago City v. Robbins, 2 Bl. 418; Bucher v. Cheshire Ry. Co., 125 U. S. 555. See, further, Ridings v. Johnson, 128 U. S. 12, 9 Sup. Ct. Rep. 72, 76.

[22] 103 U. S. 697.

[23] And see, further, Ethridge v. Sperry, 11 Sup. Ct. Rep. 565.

[24] A question that seems not to have been passed upon is whether, when a question of title has arisen between parties claiming title under grants from different States, and has been decided by the State courts, that decision will be binding upon the federal courts in subsequent cases as a rule of property; *e. g.*, does the decision in Salmon v. Webb, 12 B. Mon. 365, establish a rule of property that should be adhered to in the federal courts? In this case the dispute was between claimants under Virginia and Kentucky patents, and a judgment in favor of claimant under Kentucky patent was affirmed. It is apprehended that the federal courts would not consider themselves absolutely bound by that decision.

[25] 125 U. S. 555.

Court, though disapproving of this doctrine, yet considered themselves bound by these decisions of the State court. The decisions were not on the construction of a statute, yet they decided the effect of one and thus established a rule of a purely local character. Justice Miller there said: "There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England and established as the laws of the States. Each State of the Union may have its local usages, customs and common law. When, therefore, in an ordinary trial in an action at law, we speak of the common law, we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the State courts in reference to this law, and defining what is the law of the State as modified by the decisions of its own courts, by the statutes of the State and the customs and habits of the people that the trouble arises. It may be said generally that wherever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive and always entitled to the highest respect of the federal courts." It would thus seem that the statute has been extended even to State decisions on questions purely of tort, if it is of a local nature. Still, there was a divided court upon this very question, and the decision is too indefinite regarding the scope of the rule here announced to be wholly satisfactory.[26] In an action for personal injuries, upon the question as to who were fellow-servants, it has been held that decisions of the courts of the State in which the injury occurred should be followed.[27] The above are the classes of cases in which the federal courts consider themselves bound to follow the State courts, but it may here be said that in other cases they lean towards an agreement of views with the State courts.[28]

9. *Commercial Law.*—We now come to a class of cases in which the federal courts have held that they were not bound by State decisions. In Swift v. Tyson, *supra*, it was distinctly and authoritatively announced for the first time that the federal courts would not be bound by decisions of State courts upon matters not at all dependent upon local statutes or local usages of a fixed and permanent operation, but of a more general nature, and especially questions of general commercial law. This rule has been followed in a very great number of cases, and is now one of the most firmly established doctrines relating to this subject.[29] The terms "commercial law" and "law of general nature," as found in some of the decisions, are somewhat indefinite. Their meaning can perhaps be best shown by enumerating some of the matters which have been held to be included under them. Such are questions in the law of insurance, liability for negligence of individuals and common carriers, negotiable paper, municipal bonds, bills of lading, master and servant, and contracts of corporations.[30] The reason of the rule that State decisions relative to commercial jurisprudence are not binding upon federal courts is, that commercial law is not the law of any particular State, but is the law of the commercial world.[31] Bouvier says that "it is less local and more cosmopolitan in its character than any other great branch of municipal law."[32] In the case of Railway Co. v. Nat. Bank,[33] it is said: "The true interpretation of commercial law is to be found, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence." Subsequently, in Railway Co. v. National Bank,[34] Bradley, J., in a concurring opinion, said: "Commercial law

[26] See, further, in this connection, City of Detroit v. Osborne, 135 U. S. 499, 10 Sup. Ct. Rep. 1012.

[27] Easton v. Hueston & T. C. Ry. Co., 32 Fed. Rep. 893. (Since writing the above the case of Northern Pac. Ry. Co. v. Peterson, 51 Fed. Rep. 182, decided by the circuit court of appeals for the eighth circuit has appeared. There the court refused to follow the decisions of the State in which the injury occurred, upon the question of who were fellow-servants.)

[28] Burgess v. Seligman, 107 U. S. 20; Jencks v. Quidnick, 10 Sup. Ct. Rep. 655.

[29] Boyce v. Tabb, 18 Wall. 546; Railroad Co. v. National Bank, 92 U. S. 14; Railroad Co. v. National Bank, 102 U. S. 14; Watson v. Tarpley, 18 How. 517; Mercer County v. Hackett, 1 Wall. 83; Hough v. Railway Co., 100 U. S. 213; Myrick v. Mich. Cent. Ry. Co., 107 U. S. 102; Liverpool, etc. Co. v. Insurance Co., 129 U. S. 397, 9 Sup. Ct. Rep. 469.

[30] Foster's Fed. Pr. § 375, and cases cited.

[31] See Watson v. Tarpley, 18 How. 517.

[32] Bouvier's Law Dict. tit. commercial law.

[33] 92 U. S. 14.

[34] 102 U. S. 14.

is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world."

10. *Contracts.*—Another class of cases in which the United States Supreme Court has emphatically expressed itself, is that in which the question arises as to whether or not a State law, whether statutory or announced by decision, impairs the obligation of contracts. The question as to the following of State decisions may arise in two ways under that head: First, as to whether there is a contract. On this question the supreme court has decided that they were not bound to follow State decisions that had decided that matter.[35] In Delmas v. Insurance Co., *supra*, the court, by Justice Miller, said: "This court has always jealously asserted the right, when the question before it was the impairing the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired." Second. When a contract was made under the law as construed and acquiesced in by all the departments of State government, and was apparently valid, and the State courts have subsequently construed the law in such a manner as to invalidate the contract. In Ohio Life Insurance Co. v. Debolt,[36] the court said: "The sound and true rule is that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decisions of its courts altering the construction of the law." This was decided also in Gelpcke v. City of Dubuque.[37] The facts of that case were as follows: The State of Iowa had passed a statute authorizing municipal bodies to issue bonds. The supreme court of the State soon decided in a number of cases that the act was constitutional. Subsequently to this, and on the strength of these decisions a large number of bonds were issued. The *personnel* of the State supreme court being changed, that court held the act unconstitutional. The question as to the validity of these bonds then came before the United States Supreme Court. This court refused to follow the later State decisions and held the bonds to be valid.

11. *Change of State Decisions.*—A question that has sometimes presented itself to the federal courts is, what will be the effect if, subsequent to the decision of a question by the federal courts, the State courts should rule differently, or should overrule their former decisions upon that same matter? In Green v. Neal's Lessee,[38] the construction of a statute of limitations of Tennessee having been passed upon by the federal courts, and the State supreme court having subsequently ruled differently upon the same question, the query was raised before the Supreme Court of the United States as to whether they should follow the former ruling of their own court, or ignore that and follow the ruling of the State court. It was decided that the latter was the proper course. In the opinion the court said: "The same reason which influences this court to adopt the construction given to the local law in the first instance, is no less strong in favor of following it in the second, if the State tribunals should change their construction. * * * A refusal in the one case as well as in the other, has the effect to establish in the State two rules of property." This ruling has since been followed by the Supreme Court of the United States.[39] But every oscillation in the process of settling the rule in the State courts will not be followed.[40] Another question which has sometimes arisen is whether, when the circuit court has rendered a decision in accordance with the law as expounded by the State courts at the time, and during the interval between the rendition of such decision and the hearing in the supreme court on appeal, the supreme courts have changed their rulings, the supreme court should reverse the decision of the circuit court and follow the State court. It has several times been decided that in such case the ruling of the circuit court would not be reversed.[41]

A. HOLLINGSWORTH.

[35] State Bank of Ohio v. Kroop, 16 How. 369; Delmas v. Insurance Co., 14 Wall. 661.

[36] 16 How. 416.

[37] 1 Wall. 175.

[38] 6 Pet. 291.

[39] Suydam v. Williamson, 24 How. 427; League v. Egery, 24 How. 264.

[40] Myrick v. Heard, 31 Fed. Rep. 241; Gelpcke v. Dubuque, 1 Wall. 175.

[41] Morgan v. Curtenius, 20 How. 1; King v. Dundee Mort., etc. Co., 28 Fed. Rep. 33; Burgess v. Seligman, 107 U. S. 20. But see Moore v. Nat. Bank, 104 U. S. 625.

HUSBAND AND WIFE—PARTNERSHIP BETWEEN—VALIDITY.

GILKERSON-SLOSS COMMISSION CO. V. SALINGER.

Supreme Court of Arkansas, June 4, 1892.

A *feme covert* cannot form a partnership with her husband, and, where she attempts to do so, is not liable as his surviving partner, notwithstanding Const. 1874, art. 9, § 7, which provides that the real and personal property of any *feme covert*, whether acquired before or after marriage, shall be her "separate estate," shall "not be subject to the debts of her husband," and shall "be conveyed by her the same as if she were a *feme sole*;" and the provisions of Mansf. Dig. § 4625, that a married woman may "transfer her separate personal property, and carry on any trade or business," and perform labor on her "sole and separate account;" that her earnings from her "trade, business, labor, or services" shall be her "sole and separate property;" and that "she may alone sue or be sued" on account of the said property, business, or service.

HUGHES, J.: The question is presented by a demurrer, which the court below sustained to the following complaint: "Monroe Circuit Court. Gilkerson-Sloss Commission Company, Plaintiff, v. Lena Salinger, Defendant. Amended Complaint at Law. The plaintiff, Gilkerson-Sloss Commission Company, a corporation incorporated under the laws of Missouri, doing business at St. Louis, states that Louis Salinger died on the 26th day of November, 1890; that at the time of his death and for five years previous thereto the defendant, Lena Salinger, was the wife of said Louis Salinger; that for some time previous to January 20, 1888, the defendant and one William Hooker, were partners in trade, under the firm name of William Hooker & Co., doing a general mercantile business at Brinkley, Ark., and on said 20th day of January, 1888, said William Hooker sold and transferred all his right and interest in the property and assets of said firm of William Hooker & Co. to said Louis Salinger, and thereby said Louis Salinger, and the defendant, Lena Salinger, became jointly interested in the ownership of said partnership property, and said Louis and Lena then and there agreed to adopt the firm name and style of L. Salinger & Co., and to carry on and continue said mercantile business as partners with each other, and they did adopt said name and style of L. Salinger & Co., and did, pursuant to such partnership agreement, carry on such business from the said 20th day of January, 1888, until the day of said Louis Salinger's death, to-wit, November 26, 1890, and while such partnership business of L. Salinger & Co. was being carried, to-wit, during the year 1890, the plaintiff sold and delivered to L. Salinger & Co. goods, wares and merchandise to the amount of $1260.36, for part of which said L. Salinger & Co. executed to plaintiff two promissory notes. An itemized statement of plaintiff's account against L. Salinger & Co., including the amount of said notes, together with the notes, is herewith filed, showing all credits to which they are entitled, and leaving a balance of $571.59 due and unpaid to plaintiffs." No part of said indebtedness has been paid except as credited on said statement. Can a married woman become the partner of her husband in a mercantile business? In many of the States it is held that she may, under statutes enlarging the powers of married women, and removing in part their disabilities at common law. It is so held in Suan v. Caffe, 122 N. Y. 308, 25 N. E. Rep. 488. But the weight of authority is that she cannot. At common law, the legal existence of the wife was merged in that of the husband, and they could not contract with each other. Sec. 7, art. 9, Const. 1874, provides that "the real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and be devised, bequeathed, or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband." It has been held that under this section a married woman may convey her separate estate, and acknowledge the execution of a deed for registration as a *feme sole*. Roberts v. Wilcoxson, 36 Ark. 355. She cannot, however, make an executory contract to convey land which will bind her or her heirs. Felken v. Tighe, 39 Ark. 357; Christman v. Partee, 38 Ark. 31. By section 4625 of Mansfield's Digest it is provided that "a married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or service on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may alone sue or be sued in the courts of this State, on account of the said property, business or services." Under similar statutes it has been held by some courts that a married woman could not become the partner of any one in business. In Abbot v. Jackson, 43 Ark. 212, Judge Eakin said: "It is well settled, too, that a married woman, under such statutes as that of April 28, 1873, can form a partnership as a sole trader with a third person, other than her husband," etc. But it has not been heretofore determined expressly in this State that a married woman can or that she cannot enter into partnership with her husband. In Countz v. Markling, 30 Ark. 17, it was held that a judgment by confession rendered against the husband in favor of the wife is void, and will be quashed on *certiorari*. This was on the ground of the legal unity of husband and wife, and the inability of the wife to sue the husband at common law. In Pillow v. Wade, 31 Ark. 678, it is held that husband and wife are incapable of contracting with each other. Under a similar statute to ours it is held in Haas v. Shaw

91 Ind. 384, that a wife cannot form a partnership with her husband. See, also, Lord v. Parker, 3 Allen, 127; Plumer v. Lord, 5 Allen, 460; Speier v. Opfer, 73 Mich. 35, 40 N. W. Rep. 909; Har. Cont. Mar. Wom. § 618; Mayer v. Loyster, 30 Md. 402; Carey v. Burrus, 20 W. Va. 571; De Graum v. Jones, 23 Fla. 83, 6 South, Rep. 925. In view of the legal unity and identity of husband and wife at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action. The judgment is affirmed.

NOTE.—The opinion of the court in the principal case, is undoubtedly supported by the weight of authority. Though modern statutes have made many innovations and changes in the law applicable to married women, and though a married woman may, under the terms of a statute, become what is in law known as a sole trader, wherein her sole and separate estate becomes responsible, and may even at law enter into contracts of partnership with third persons generally, the weight of authority, certainly, in this country, point to the conclusion that a married woman, without separate estate cognizable by equity courts, cannot enter into a partnership with her husband, even under the broadest of the modern married woman's acts.

In Massachusetts it has been held in several cases, that husband and wife cannot contract together or become partners in business, and that all such contracts are absolutely void, notwithstanding the statute enabling a wife to contract generally. Kneil v. Eggleston, 22 Cent. L. J. 133; Lord v. Parker, 3 Allen, 127; Plumer v. Lord, 5 Allen, 460; Knowles v. Hull, 90 Mass. 521. The Massachusetts cases were followed in Indiana, Haas v. Shaw, 91 Ind. 384; Scarlet v. Snodgrass, 92 Ind. 262. The same doctrine of disability to contract with her husband has been laid down in Ohio, Levi v. Earl, 30 Ohio St. 67; Payne v. Thompson, 44 Ohio St. 192. In Michigan, Artman v. Ferguson, 40 N. W. Rep. 907. In Texas, Miller v. Marx, 65 Tex. 151; Cox v. Miller, 54 Tex. 16; Brown v. Chancellor, 61 Tex. 445; Smith v. Bailey, 66 Tex. 553. In West Virginia, Carey v. Burruss, 20 W. Va. 571. In Maryland, Mayer v. Soyster, 30 Md. 402. In Illinois, Hoker v. Boggs, 63 Ill. 161. In Oregon, Knott v. Knott, 6 Oreg. 150. In Tennessee, Frank v. Anderson, 13 Lea, 695. In Wisconsin, doubts have been expressed by the courts whether a married woman can enter into a contract of partnership with her husband, Horneffer v. Duress, 13 Wis. 603; Duress v. Horneffer, 15 Wis. 195. The New York courts are in conflict upon the question. The late case of Suan v. Caffe, 25 N. E. Rep. 488, 32 Cent. L. J. 126, recently decided by the Court of Appeals of New York, holding that under the statute of that State a married woman may form a partnership with her husband. But this case does not seem to be supported by the weight of authority, even in that State.

The only case outside of the New York case, in which the capacity of husband and wife to enter into partnership has been clearly asserted, is, *In re* Kincaid, 3 Biss. 405, wherein United States District Judge Blodgett, holds that under the married woman's act of Illinois, a married woman may enter into a contract of partnership with her husband. No Illinois cases however are found, supporting that view of the statute.

The dissenting opinion of two of the judges in the principal case, is of interest as showing the opposite view. They are of opinion that under the constitution and laws of Arkansas, a married woman is, as to her separate personal property, clothed with all the powers of a single woman; that she may make contracts in reference to it with her husband or with others, binding upon her in law, just as though she were single; that she may be sued upon said contracts in a court of law, where the action is otherwise properly cognizable in law; and that, since it is settled that she may engage in business, as a partner with others than her husband, it follows from exactly the same reasons that she may embark her property or services in a partnership with him.

Their reason in brief are that whatever law can be appealed to as authorizing her to form a partnership with any person is without limitation or restrictions as to the person with whom she may form it; and that, as it confers a power without restriction in that respect, it can be held to exclude the husband only by a system of judicial construction which seems to be legislation,—and that towards restraining the power vested under an act which is highly remedial, and expressly calls for a liberal construction. Mansf. Dig. § 4639. At the common-law, a married woman had no power to make a valid contract with her husband, or with anybody else. Her disability was general, and whatever power she now has must be found in the statutes. They authorize her to bargain, sell, assign, or transfer her separate personal property, and carry on any trade or business and perform any labor or services on her sole and separate account. This has been held as authorizing her to make contracts and enter into partnerships; and how it can be said that the right is given to be exercised as to one person, and is not as to any other, the dissenting judges do not see. They claim that by its terms it extends as much to dealings with one person as with another, and, if it exists at all, it exists generally as to all persons, unless the courts limits a power which came from the legislature unlimited. They say that if they were attempting to restrict the operation of the act and limit the exercise of the power to any person or class of persons according to the principles of public policy, they should have to consider whether it would not be better to include the husband, and exclude others, than to permit a partnership with all others and forbid it as to him. But, as they view the act, it contains no restrictions, and I have no right to ingraft any to meet my ideas of policy.

The dissenting judges cite as authority, the case of Suan v. Caffe, above noted, and also the case of Toof v. Brewer (Miss.), 3 South. Rep. 571, where the question is exhaustively and ably considered. That case depended upon the laws of Arkansas and the Supreme Court of Mississippi upon a review of the decisions and statutes of the former State and the general current of authorities, held that a woman could become a business partner of her husband in Arkansas.

See upon this subject, a very extensive note in 32 Cent. L. J. page 128.

BOOK REVIEWS.

DIRECT LEGISLATION BY THE PEOPLE.

This little book of 200 pages ought to interest all lawyers who give attention to political subjects and to studies otherwise than purely professional. The importance of the questions discussed, makes it a valuable hand book to every citizen who takes an interest in the question of how to prescribe rules by which the actions and destinies of the individual shall be controlled for the public good. The object of the book is to show that the best means of legislation is direct legislation by the people. The author sets forth in an interesting way the advantage of combining direct popular legislation with representative institutions. And he points out the modes of direct legislation which are to his mind the best and most practicable. He does not advocate direct legislation by the people upon the ground that any absolute practice of government requires it, and does not believe in attempting to found political institutions upon abstract dogmas, but he contends that democracy must recognize some principle of restraint upon its own passions and some guard against its own deficiencies. He believes that direct popular legislation, under proper modes and forms, is at once democratic and conservative, accords with the tendency and spirit of the time, and will remedy some serious imperfections of our present system of law making, and some evils of our political life. He does not wish to be understood as presenting direct legislation as a simply sovereign remedy for all the political ills of society. He urges it as an improper practical reform worthy not only of consideration but of adoption. "With our traditions of popular government and with the palpable defects of our existing system of lawmaking staring us in the face, we do not hesitate to say that popular lawmaking duly regulated and restricted would be a valuable reform." The book is published by A. C. McClurg & Co., Chicago.

AMERICAN STATE REPORTS, Vol. 24.

It would be impossible to call attention to all the cases of merit and to the many valuable notes to cases in this volume. The following are a few of the most important. Trentor v. Pothen (Minn.), to which there is an exhaustive note on the subject of notice to agent as notice to principal. Brooks v. Black (Miss.), upon the subject of damages recoverable on breach of warranty of title. Lines v. Lines (Pa.), upon the subject of how far a gift by husband to wife is fraudulent. Lillibridge v. Lackawanna Coal Co. (Pa.), to which there is a valuable note on the subject of title to minerals and the severance of minerals from the surface and the rights incident to grant of minerals. The note to Garland v. Garland (Va.), is exhaustive of the subject of spendthrift trusts. Bolling v. Kirby (Ala.), discusses the subject of the conversion of personalty.

The volumes of this series are prepared in first class style, and should be in the library of every practitioner. They are published by Bancroft-Whitney Company, San Francisco.

SCHOULER ON WILLS.

With the exception of the treatise of Judge Redfield, this is the only American work upon the subject of wills which has had anything like a general circulation. Of the former it may be said that, though a treatise of great merit, it is now quite old, and owing to the death of Judge Redfield and the lack of a successor to undertake the task of a revision, has not a modern value. Whatever Mr. Schouler writes is first class, and this volume is no exception to that general rule. He is well known as the author of many works of standard authority. This present work was prepared as a companion volume to his work on "Executors and Administrators," which was published first. This one treats of wills, their nature, essentials and mode of interpretation, while the former book discussed the administration of estates, testate and intestate, and the rights and duties of executors and administrators; and the two volumes together fairly comprehend the English and American law relating to estates of decedents traced historically and logically down to the present day. The present work goes exhaustively into the subject of wills, the capacity and incapacity to make, the formal requisites, revocation, alteration and republication and construction. We do not need to say that the book is accurate and exhaustive; the reputation of the author is an assurance of it. The mechanical execution is in every respect commendable, the volume being handsomely printed and bound. It is published by the Boston Book Company, Boston.

BOOKS RECEIVED.

Benjamin's Treatise on the Law of Sale of Personal Property, with References to the American Decisions and to the French Code and Civil Law. Sixth American Edition, from the Latest English Edition. With American Notes by Edmund H. and Samuel C. Bennett. Boston and New York: Houghton, Mifflin & Co. The Riverside Press, Cambridge. 1892.

A Digest of the Decisions of the Courts of Last Resort of the Several States, from the Year 1887 to the Year 1892, Contained in the American State Reports, Volumes 1 to 24, inclusive, and of the Notes therein Contained, to which is prefixed an Alphabetical Index to the Notes. By William Mack, of the San Francisco bar. San Francisco. Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Arbitration Clause.—A certificate of membership in a mutual accident association provided that "any claim under this certificate shall, if the association require it, be referred to arbitration, and no suit or proceeding at law or in equity

shall be brought to recover any sum under this insurance, unless the same shall be commenced after 90 days, and not later than one year," after the alleged accident: Held, that the arbitration clause constitutes no condition precedent, and cannot be pleaded in bar or abatement in a suit on the certificate; such clause not ousting the court of jurisdiction, but simply referring the question of the amount of damages to arbitration. —SMITH V. PREFERRED MASONIC MUT. ACC. ASS'N, U. S. C. C. (Ind.), 51 Fed. Rep. 520.

2. ACCOUNT STATED— Impeachment.—Where a surviving partner, having in his possession a note, of the partnership, which he is led by the representations of a third person to believe will be paid, renders an account, under Code Civil Proc. § 1585, for the purpose of adjusting the partnership affairs, and determining what part of the money thereon should go, when collected, to the estate of the deceased partner, which account is finally settled, but the note afterwards fails of collection, he may have the account opened.—GREEN V. THORNTON, Cal., 30 Pac. Rep. 965.

3. ACTIONS — Title to Personalty.—A suit against a city to prevent it from applying a certain fund, on deposit in bank, to a purpose other than that for which it is alleged to have been created, until certain claims of plaintiff have been adjusted and paid as it involves the question of the title to specific personal property, is, under Code Proc. § 158, a local action, and the superior court of a county other than that in which the fund is on deposit has no jurisdiction of the subject-matter of the action.—CITY OF NORTH YAKIMA V. SUPERIOR COURT OF KING COUNTY, Wash., 30 Pac. Rep. 1053.

4. ADMINISTRATION—Appointment —In case of intestacy, where there is no widow, administration must be granted to one of the next kin, if any one of them, against whom no disqualifying objection exists, will accept it.—CRAMER V. SHARP, N. J., 24 Atl. Rep. 962.

5. ADMINISTRATION — Life Insurance Premiums. — Where a life police is payable to the widow, it does not become assets of the estate; and the administrator can neither collect it nor maintain an action against her, under Rev. St. ch. 64, § 48, cl. 4, to recover the premiums paid by the insured within three years of his death, as belonging to the estate.—DOUGLASS V. PARKER, Me., 24 Atl. Rep. 957.

6. ADMINISTRATION—Sale of Land.—A provision in an order of license to administrators to sell real estate to pay debts required them to execute a sale bond in a specific sum. After the appraisal, and before sale, the probate court approved a satisfactory bond in a less amount: Held, that the variance was not fatal to the validity of the sale—IN RE WINONA BRIDGE RY. CO., Minn., 52 N. W. Rep. 1079.

7. ADOPTION— Effect. — A legally adopted child is a lineal descendant of its adopting parents, within the meaning of Rev. St. ch. 74, § 10, and, as such, may take a legacy given by will to one of its adopting parents, and thus prevent the legacy from lapsing, when the legatee dies before the testator.—WARREN V. PRESCOTT, Me., 24 Atl. Rep. 949.

8. APPEAL— Dismissal.— Where the record contains no statement of facts, and the transcript contains what purports to be the testimony, and is without any certificate of the judge who tried the cause, the appeal will be dismissed.—TACOMA FOUNDRY & MACHINE CO. V. WOLFF, Wash., 30 Pac. Rep. 1053.

9. APPEAL — Supersedeas Bond.—A *supersedeas* bond, conditioned according to the statute for prosecuting an appeal with effect and answering all damages and costs, covers not merely compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by appellant to appellee.—ROSENSTEIN V. TARR, U. S. C. C. (Mass.), 51 Fed. Rep. 368.

10. ASSIGNMENT OF DEBT—Mechanics' Liens.—An assignment by one who has contracted to erect a building, of the money due and to grow due to him thereon, will prevail over a notice served upon the owner by a laborer or material man after the assignment, but before notice thereof to the owner.— BOARD OF EDUCATION OF SCHOOL DIST. NO. 85 OF LONG BRANCH V. DUPARQUET, N. J., 24 Atl. Rep. 922.

11. Assumpsit—Gratuitous Services.—In an action for services rendered, where the evidence shows that plaintiff and defendant were in the habit of mutually receiving and rendering services with no present thought of charging therefor, no recovery can be had. —GROSS V. CADWELL, Wash., 30 Pac. Rep. 1052.

12. ATTACHMENT — Subrogation. — Where a grantee buys real estate, and at the request of the grantor pays the consideration due therefor to certain persons having suits pending against the grantor, with attachments on such real estate to secure lien claims due them on the same, such grantee will be subrogated to the ownership of the claims thus paid, and, with the consent of such persons, he may prosecute such suits in their names for his own benefit, to prevent the priority of later attachments placed upon the property without his knowledge after he paid out his money and before he recorded his deed.— STEVENS V. KING, Me., 24 Atl. Rep. 850.

13. ATTACHMENT—Vessel at Sea.—A vessel at sea cannot be constructively attached, under the laws of Maine, by an officer upon the land.— BRADSTREET V. INGALLS, Me , 24 Atl. Rep. 858.

14. ATTORNEY AND CLIENT.—Counsel employed both as attorney and agent to manage and conduct proceedings to collect a mortgage has authority to bind his client to pay off, out of the proceeds of the property, a superior lien upon it in favor of another creditor which is being enforced by levy, and thereby free the property from such levy and lien.— BARFIELD V. MCCOMBS, Ga., 15 S. E. Rep. 667.

15. ATTORNEYS — Disbarment. — In a proceeding for disbarment, where the charge against respondent involves a distinct and specific criminal offense, judgment should be pronounced against him only on clear and convincing proof.—PEOPLE V. PENDLETON, Colo., 30 Pac. Rep. 1041.

16. BANK STOCK — Unpaid Certificates. — Where the prospective vice-president and manager of a bank not yet established issues and delivers to the prospective cashier unpaid certificates of stock in such bank, and the latter fraudulently procures a personal loan on the stock from a bank that has no sufficient knowledge of the facts to put it on inquiry, such prospective vice-president is personally liable in an action by the lender for the amount of the loan. — MERCHANTS' NAT. BANK OF KANSAS CITY V. ROBISON, Utah, 30 Pac. Rep. 985.

17. CARRIERS— Lien—Interpleader.—A bill by a common carrier, setting up a lien for freight, the correctness of which, however, is not shown to have been assented to, and asking that a delivery of the property be conditioned on its payment, does not show such a negation of interest in the matter as to allow complainant to demand the interpleading of the vendor of the consignee under the exercise of his right of stoppage in transitu, and of attaching creditors.—CRASS V. MEMPHIS & C. R. Co., Ala., 11 South. Rep. 480.

18. CARRIERS—Live Stock.—Although a common carrier insures the arrival of the property at the point of destination against everything but the act of God and the public enemy, yet the condition in which it shall arrive there must depend upon the nature of the article to be transported. He does not absolutely warrant live stock against the consequences of its own vitality.—DOW V. PORTLAND STEAM PACKET CO., Me., 24 Atl. Rep. 945.

19. CARRIERS — Passenger—Tickets. — The statute of this State which makes a ticket for a passage on any railroad binding on the railroad company for six years from its date, with the right of the holder of the ticket to stop off at the usual stopping places as often as he pleases during that period, cannot apply to a ticket

purchased in Canada for a continuous passage on a particular day over the defendant's road from that province through portions of the States of Vermont and New Hampshire into Maine. Such an application of the statute would work an interference with both foreign and interstate commerce in the carriage of passengers — LAPARIER V. GRAND TRUNK RY. OF CANADA, Me., 24 Atl. Rep. 848.

20. CARRIERS OF GOODS — Connecting Lines.—In the absence of any regulation by law or custom, a railway company receiving freight from a connecting line is not required to advance or assume payment of the charges due thereon for transportation from the point of origin to the point of connection.—OREGON SHORT LINE & U. N. RY. CO. V. NORTHERN PAC. R. CO., U. S. C. C. (Oreg.), 51 Fed. Rep. 465.

21. CHAMPERTY — Evidence. — An agreement, to be champertous, must stipulate for the prosecution or defense of a suit. Litigation is an essential element of champerty. — BURNHAM V. HESELTON, Me., 24 Atl. Rep. 955.

22. CONSTITUTIONAL LAW—Grand Jury.—The provisions of Sess. Laws 1889, p. 227, requiring for the regulation of the trial of offenses against the territory that the jury shall be drawn from the several counties comprising the judicial district over which the United States district court has jurisdiction solely for the trial of infractions of United States law, and that in certain counties 21 men shall constitute the grand jury, any 12 of whom may find an indictment, and in other counties the number of grand jurors shall be 12, any 9 of whom may find an indictment, or in contravention of act of congress (approved 30th July, 1886) providing that no local or special law shall be enacted by the legislature of any territory for summoning or impaneling grand or petit jurors.—TERRITORY V. BACA, N. Mex., 30 Pac. Rep. 864.

23. CONSTITUTIONAL LAW—Taxes.—The word "tax," as used in the constitution, refers to the ordinary public taxes, and not to assessments for local improvements in cities and towns.—CITY OF DENVER V. KNOWLES, Colo., 30 Pac. Rep. 1041.

24. CONTRACTS—Reformation and Specific Performance.—Reformation of a contract for the sale or exchange of lands, and a specific performance of the contract so reformed, may be had in one and the same action.—HAM V. JOHNSON, Minn., 52 N. W. Rep. 1080.

25. CORPORATE POWERS—Lease of Franchise.—A corporation, created by statute, possesses no rights, and can exercise no powers, which are not expressly given or to be necessarily implied. Such a corporation cannot lease or dispose of any franchise needful in the performance of its obligation to the State, without legislative consent.—STOCKTON V. CENTRAL R. CO. OF NEW JERSEY, N. J., 24 Atl. Rep. 964.

26. CORPORATIONS—Res Judicata.—In an action to recover an assessment on the stock of a corporation, a decision that the cause of action was barred by limitation is no bar to a subsequent action between the same parties to recover a subsequent assessment.—PRIEST V. GLENN, U. S. C. C. of App., 51 Fed. Rep. 405.

27. CORPORATIONS—Assessments—Stock Ledger.—The name Tanssing, Livingston & Co. is not *idem sonans* with Taussig, Livingston & Co., and the entry of the former on the stock books of a corporation, in the handwriting of its treasurer, is not competent evidence that the latter firm, or any of its members, are stockholders or subscribers to the stock of the corporation, when unsupported by any evidence tending to identify the name with the firm, especially after the lapse of 25 years and the death of the members of the firm.—TAUSSIG V. GLENN, U. S C. C. of App., 51 Fed. Rep. 409.

28. CORPORATION—Signature.—Where an undertaking on appeal, purporting to be executed by a corporation as surety, is signed by its second vice president and its assistant secretary, and has affixed to it the corporation seal, in the absence of anything to show that such officers were not authorized to sign and deliver the undertaking, it will not be held void, as not properly signed.—GUTZEIL V. PENNIE, Cal., 30 Pac. Rep. 836.

29. CORPORATION—Special Meeting.—The by-law of a corporation relating to the manner of calling special meetings of the board of directors, and Civil Code, § 320, provide that notices calling such meetings shall be given on "the order of the president, or, if there be none, on the order of two directors:" Held that, while there was a president of the board competent to act, a special meeting thereof called by two directors, on the refusal of the president to make the call, was illegal, and the action of a majority of the directors at such meeting in declaring the offices vacant, and electing new officers, and authorizing them to sell the corporate property, was void.—SMITH V. DORN, Cal., 30 Pac. Rep. 1024.

30. CORPORATION—Usury.—Where an agent of a foreign loaning corporation is acting under a contract therewith which provides that "all commissions on loans by the company, and all bonuses payable by borrowers in respect to such loans, shall belong to the company," he is presumed to be acting for the company in collecting commissions on loans in excess of lawful interest, when the company has knowledge of each step taken by him in their negotiation, although the agent receives the exclusive benefit of the commission.—SCOTTISH MORTGAGE & LAND INVESTMENT CO., LIMITED V. MCBROOM, N. Mex., 30 Pac. Rep. 859.

31. COUNTY OFFICERS.—Under St. 1883, p. 209, authorizing supervisors to provide "county buildings and suitable rooms for county purposes," and to manage and control the same, the power of the supervisors to designate rooms in the court house for the use of county officers is not exhausted by one designation, but they may assign to the district attorney rooms occupied by the judges of the superior court, though such rooms were designated on the building plans as "Judges' Chambers."—SAN JOAQUIN COUNTY V. BUDD, Cal., 30 Pac. Rep. 967.

32. COURTS — State Reporter.—It is the duty of the State reporter, who is a salaried officer, to report all cases left unreported at the commencement of his term of office, other than those his predecessor may need for the completion of a volume already begun.—IN RE STATE REPORTER, Penn., 24 Atl. Rep. 908.

33. CRIMINAL LAW—Arguments of Counsel.—In a prosecution for grand larceny, it was not error, during the district attorney's address to the jury, to refuse defendant's request that the stenographer's note of a witness' evidence be read to the jury, on account of an alleged misstatement of it by the district attorney.—PEOPLE V. FAULKE, Cal., 30 Pac. Rep. 837.

34. CRIMINAL LAW—Assault.—An indictment for an assault with intent to commit murder must allege the manner and means of committing the assault so far as to show that the crime would have been murder if the acts involved in the pleaded facts had not stopped short of their full effect.—TERRITORY V. CARRERA, N. Mex., 30 Pac. Rep. 872.

35. CRIMINAL LAW—Assault and Battery—Justification.—Whether approbrious words will justify a battery is a question of fact for the jury, and not one of law to be determined by the court, the jury in each case being authorized to treat such words as a justification or not, according to the nature and extent of the battery, and their own opinion of the provocation. Hence it is not error for the court to decline to charge that "approbrious words is a justification for the commission of an assault and battery, provided the battery does not go too far."—HODGKINS V. STATE, Ga., 15 S. E. Rep. 695.

36. CRIMINAL LAW—Larceny—Cattle Brands.—Comp. Laws, § 57, providing that "when the title of any stock is involved the brand on an animal shall be *prima facie* evidence of the ownership of the person whose brand it may be, provided that such brand has been duly recorded," makes a brand evidence, not of ownership in the person in whose name it is recorded, but in the owner of the brand; and, on a trial for larceny of a

animal, it may be alleged and proven that a person, other than he in whose name the brand was recorded, was the owner of the brand, or of the animal, at the time of the larceny.—TERRITORY V. CHAVEZ, N. Mex., 30 Pac. Rep. 903.

37. CRIMINAL LAW—Lotteries.—Receiving payment by defendant of the amount of a lottery ticket, of which plaintiff and defendant were joint owners and payees, is not within Code, § 4068, which makes it unlawful for any person to "set up or carry on any lottery, or sell tickets or shares in lotteries," or section 4069, which prohibits "selling lottery tickets, or gift-enterprise tickets;" and plaintiff may recover his share of the amount thus paid to defendant in an action in assumpsit.—GIPSON V. KNARD, Ala., 11 South. Rep. 482.

38. CRIMINAL LAW — Obstructing Justice.—Intentionally and designedly to get a witness drunk, for the express purpose of preventing his attendance before the grand jury, or in open court, is such an interference with the proceedings in the administration of justice as will constitute an indictable offense.—STATE V. HOLT, Me., 24 Atl. Rep. 951.

39. CRIMINAL LAW—Swindling.—One dealing with an illiterate person, writing a promissory note for him to execute, inserting therein an amount larger than that stipulated for, falsely and fraudulently reading over the note as if it contained the true amount, signing the maker's name thereto at his request, and also the name of an attesting witness, the maker and the witness both subscribing with their mark, commits the offense of cheating and swindling, but does not commit the offense of forgery.—WELLS V. STATE, Ga., 15 S. E. Rep. 679.

40. CRIMINAL TRIAL—Exclusion of Witnesses.—Where at the opening of a criminal case the parties are ordered to have their witnesses called and placed under the rule of exclusion from the court room, if a witness is not called and placed under the rule his testimony may be excluded, in the absence of any showing of its materality, or of reason for non-compliance in his case with the court's order placing witnesses under the rule.—TRUJILLO V. TERRITORY, N. Mex., 30 Pac. Rep. 870.

41. DEATH BY WRONGFUL ACT—Damages.—In an action by a father for the death of his minor son, the complaint stated the relationship of plaintiff and deceased; the latter's age, occupation, amount of his earnings; his employment by defendants; the circumstances of his death, resulting from defendant's negligence; and alleged damages to plaintiff in a certain sum: Held, that the complaint was sufficient to permit the recovery of such damages as naturally result from the death, without alleging special damages.—ORMAN V. MANNIX, Colo., 30 Pac. Rep. 1037.

42. DECEIT—Statute of Frauds.—In an action of deceit against a person for verbal misrepresentations of the financial standing of another, made in order to obtain a credit for such other person, such credit having been thereby obtained, the case is not saved from the operation of the statute of frauds by the fact that the defendant also at the same time misrepresented his own financial standing, and made certain personal promises that he has not kept.—BROWN V. KIMBALL, Me., 24 Atl. Rep. 847.

43. DEED—Description.—A description in a deed which runs down the middle of a stream in which the tide ebbs and flows, thence across the stream to the upland on the southerly side, and thence on the southerly side of such stream, conveys to the grantee the land on that side between high and low water mark.—ERSKINE V. MOULTON, Me., 24 Atl. Rep. 841.

44. DEED—Description.—A contract to convey land in a city specified two parcels between which was a strip that had been surveyed as a street, but had never been conveyed to the city as a street or otherwise. The deed given pursuant to the contract described the land as being as one parcel, and included the strip, but excepted "the street heretofore deeded to said city:" Held, that the exception excluded the strip from the operation of the deed, since the recital in the excepting clause that the strip was "deeded" to the city was merely descriptive of the strip.—RUSHTON V. HALLETT, Utah, 30 Pac. Rep. 1014.

45. DEED—Estate of Grantee.—In consideration of the conveyance of a farm by his father and mother to him, the grantee, by a written agreement, promised to support them during their life-time: Held, that he took in equity a life estate, subject to a charge for such support, to become a fee simple in case he survived them. LASHLEY V. SOUDER, N. J., 24 Atl. Rep. 919.

46. DEED—Interlineation.—Where interlineations in a deed or in the handwriting of the officer who attested it officially, the presumption is that they were made at or before the execution of the instrument.—BEDGOOD V. MCLAIN, Ga., 15 S. E. Rep. 670.

47. DEED BY WIFE.—Under Rev. St. ch. 61, § 1, it is a sufficient joinder of a husband in his wife's deed of real estate directly conveyed to her by him if he gives his written assent thereto by joining in the testimonium clause under his hand and seal, "in testimony of his relinquishment of his right of dower," and acknowledges the instrument to be his free act and deed. —ROBERTS V. MCINTIRE, Me., 24 Atl. Rep. 867.

48. DISTRESS— Evidence.— Where a distress warrant for rent, issued before the rent became due, on the ground that the tenant was seeking to remove his goods from the premises, is regular and valid on its face, and the property levied upon is claimed, upon the trial of the claim the claimant is not entitled to introduce evidence to the jury tending to prove that the ground upon which the warrant was sued out was not true in fact.—HORNE V. POWELL, Ga., 15 S. E. Rep. 689.

49. DIVORCE— Domicile.— After a person has abandoned his domicile of origin, his domicile will be considered to be in that place in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home, unless or until something which is uncertain or unexpected shall happen to induce him to adopt some other permanent home.—FIRTH V. FIRTH, N. J., 24 Atl. Rep. 916.

50. EASEMENT—Parol Evidence.—It would seem that an easement cannot be in this State imposed on land by the force of parol evidence.—LAWRENCE V. SPRINGER, N. J., 24 Atl. Rep. 933.

51. ELECTIONS AND VOTERS—Notice.—Pub. Laws, ch. 474, § 14, which requires at least seven days' notice of the time and place for the election of city officers to be posted, is merely directory; and an election of the mayor of a city held by order of the board of aldermen, under section 16, three days after an abortive election, notice of which was duly given, and one day after the notices are posted, though irregular, is not necessarily illegal, within Pub. St. ch. 238, § 4, which declares such elections illegal and void, unless called and held in the manner by law prescribed.—STATE V. CARROLL, R. I., 24 Atl. Rep. 835.

52. EMINENT DOMAIN — Crossing Railroad. — Under Local Acts 1889, No. 388, § 15, providing that the park commissioners may acquire, by legal proceedings, any land found to be necessary for the extension of any boulevard which may hereafter be laid out, a right of way for a boulevard may be condemned across the right of way of railroad companies completely occupied with their main tracks, and side tracks used as storage rooms for cars, and called a "yard."—COMMISSIONERS OF PARKS AND BOULEVARDS V. DETROIT, G. H. & M. RY. CO., Mich., 52 N. W. Rep. 1083.

53. EQUITY JURISDICTION. — To justify this court in taking jurisdiction in any case, where an action at law is already pending, the case must involve some equitable element which the common-law court cannot apply, and which must be applied in order that full and complete justice may be done.—CHASE'S EX'R V. CHASE, N. J., 24 Atl. Rep. 914.

54. EVIDENCE — Proof of Value.— In an action by a newspaper company against an association organized to procure and distribute news, for the al-

leged wrongful cancellation of its membership therein, evidence as to the number of proposed purchasers of the membership and the amounts offered was admissible, as showing the value thereof.—REPUBLICAN NEWSPAPER CO. OF OMAHA V. NORTHWESTERN ASSOCIATED PRESS, U. S. C. C. of App., 51 Fed. Rep. 377.

55. EXECUTION — Exemptions — Horses. — A stallion kept solely for breeding purposes, and not used as a work horse, is not exempt from execution under the third paragraph of section 3243, Gen. St. Nev. The legislature intended by that paragraph to exempt to the debtor such animals as would be useful in assisting him to gain a livelihood by farming, etc., as ordinarily conducted.—KRIEG V. FELLOWS, Nev., 30 Pac. Rep. 994.

56. FEDERAL COURTS— Jurisdiction.— A suit in a federal court by a stockholder in behalf of himself and other stockholders against a corporation and its officers and directors, seeking by injunction to correct abuses of administration, alleging insolvency, and asking the appointment of a receiver to wind up the business and pay the debts of the corporation, is not identical, as to interests of parties, with a subsequent suit in a State court by a judgment creditor in behalf of himself and other creditors to ascertain the validity of a deed of assignment from the corporation to certain trustees, and asking the appointment of a receiver, with power to collect all assessments that may be made on the capital stock, and otherwise care for and collect the assets and credits of the corporation; and the pendency of the former suit, and the appointment of a receiver therein does not deprive the State court of jurisdiction to entertain the latter.—LIGGETT V. GLENN, U. S. C. C. of App., 51 Fed. Rep. 381.

57. FISHERIES— Exclusive Privileges.—The State has the exclusive jurisdiction to regulate and control the fisheries in the waters of the State, both tidal and interior waters.—STATE V. TOWER, Me., 24 Atl. Rep. 898.

58. FRAUDS, STATUTE OF.—A promise by an agent of the vendee of cedar logs to be thereafter delivered, to pay over the purchase money therefor, with the consent of the vendors, to third parties who were to furnish goods to such vendors, conceding that said agent had authority to make such a promise, is not a transaction within the statute of frauds, and required to be in writing.— AMERICAN LEAD PENCIL CO. V. WOLFE, Fla., 11 South. Rep. 488.

59. FRAUDULENT CONVEYANCES — Parties.— A bill in equity against a trustee to subject property alleged to have been fraudulently conveyed to him cannot be sustained when the grantor is not a party, if complainant has no judgment against him, but merely alleges indebtedness on notes.—CHADBOURNE V. COE, U. S. C. C. of App., 51 Fed. Rep. 479.

60. HABEAS CORPUS—Federal Courts.—Where a person, under bail to answer an indictment in a federal court, is arrested on State process for a crime against the State, his confinement thereunder is not in violation of any law of the United States, and he is not entitled, as a matter of personal right, or at the instance of his sureties, to be released on *habeas corpus*, and placed in the custody of the marshal. If the federal authorities do not insist upon the prior jurisdiction of the federal court, the accused and his sureties have no right to complain.— IN RE FOX, U. S. D. C. (Cal.), 51 Fed. Rep. 427.

61. HABEAS CORPUS— Jurisdiction.—A writ of *habeas corpus* cannot be used as a substitute for a writ of error, for the purpose of reviewing alleged errors, either of fact or law, occurring at a criminal trial, but, being in the nature of a collateral attack upon the judgment, is limited to the inquiry whether the trial court has acted without jurisdiction, or has exceeded its jurisdiction, so as to render the sentence void.—IN RE KING, U. S. C. C. (Tenn.), 51 Fed. Rep. 434.

62. HUSBAND AND WIFE— Community Property. — A husband, in carrying on a business for profit is *prima facie* acting in the interest of both himself and wife, and a debt incurred in such business is *prima facie* a debt for which the community property is liable.—OREGON IMP. CO. V. SAGMEISTER, Wash., 30 Pac. Rep. 1058.

63. HUSBAND AND WIFE—Creditors.—By virtue of Rev. St. ch. 61, § 1, property conveyed to the wife, but paid for by the husband, may be taken as the property of her husband to pay his debts contracted before such purchase.—BERRY V. BERRY, Me., 24 Atl. Rep. 957.

64. HUSBAND AND WIFE—Specific Performance.—The stipulation to pay an allowance to the wife, contained in articles of separation, will be enforced in equity.—ASPINWALL V. ASPINWALL, N. J , 24 Atl. Rep. 926.

65. INSOLVENCY—Attachment by Assignee.—Sections 33 and 34 of the insolvent law (Rev. St. ch. 70) are to be interpreted so as to give a field of operation to each, and construed with reference to the established principle that an assignee in insolvency stands in the place of the insolvent debtor, and takes only the property which he had subject to all valid liens and equities.—NEWBERT V. FLETCHER, Me., 24 Atl. Rep. 889.

66. INSURANCE.—The term "merchandise" in a policy of insurance against fire may be used to describe property intended for use, and not for sale.—HARTWELL V. CALIFORNIA INS. CO., Me., 24 Atl. Rep. 954.

67. INTOXICATING LIQUORS—Illegal Transportation.—An indictment which avers an illegal transportation of intoxicating liquors from a place in Waldo county to Clinton and Waterville, in Kennebec county, does not charge the commission of any part of the offense within Kennebec county; the latter places being towns in Kennebec county on the line between the two counties, and there being no other averment of venue in the indictment.—STATE V. BUSHEY, Me., 24 Atl. Rep. 940.

68. INTOXICATING LIQUORS—Illegal Transportation.—A complaint for the illegal transportation of intoxicating liquors is fatally defective if it omits to state that the defendant knew that the liquors transported by him were intoxicating.—STATE V. MCDONOUGH, Me., 24 Atl. Rep. 944.

69. INTOXICATING LIQUORS—Illegal Transportation.—In an indictment charging the illegal transportation of intoxicating liquors from place to place, the places must be named and proved as named. The offense being local, place is an essential part of the description of the offense.—STATE V. LIBBY, Me., 24 Atl. Rep. 941.

70. INTOXICATING LIQUORS—Local Option.—An indictment for violation of the local option law need not set out the various steps by which the law had been adopted in the county. It is sufficient to allege that the law had been adopted and was in force within the county on the day on which the offense is charged.—STATE V. SEARCY, Mo., 20 S. W. Rep. 186.

71. INTOXICATING LIQUORS — Local Option Laws.—*Prima facie* a local statute which prohibits the sale of spirituous liquors within five miles of certain specified churches applies only to sales outside of the limits of incorporated towns, villages, or cities.—HART V. STATE, Ga., 15 S. E. Rep. 685.

72. INTOXICATING LIQUORS—Sunday Sales.—Comp. Laws 1884, § 933, provided that any person found on Sunday engaged in "selling liquors, or any other kind of property," or "engaged in any labor, except works of necessity, charity, or mercy," should be punished. Laws 1887, ch. 26, amended section 933, *inter alia*, by omitting the words "selling liquors, or any other kind of property," and imposed the penalty on any one found on Sunday "engaged in any labor, except works of necessity, charity, or mercy:" Held, that the omission did not restrict the ordinary meaning of the words "engaged in any labor," and a person who sells intoxicating liquors on Sunday is "engaged in labor," within the inhibition of the amendatory act.—CORTESY V. TERRITORY, N. Mex., 30 Pac. Rep. 947.

73. JUDGMENT—Findings.—A judgment will not be reversed because of the failure of the trial court to find on issues, the burden of proving which was on appellant, unless he shows by bill of exceptions or by statement that he offered evidence in support thereof

sufficient, in the absence of countervailing evidence, to justify a finding in his favor thereon.—NEWMAN V. MALDONADO, Cal., 30 Pac. Rep. 833.

74. JUDGMENT — Unauthorized Appearance by Attorney.—In a petition for the review of an action in which the defendant was absent from the State, and had no notice of the suit, but in which an attorney at law appeared and continued to act until judgment was rendered, it is competent for the petitioner to prove by parol that the attorney's appearance was without his knowledge or authority, and, if the fact is established, the appearance can in no way legally affect him.—MCNAMARA V. CARR, Me., 24 Atl. Rep. 856.

75. JUDICIAL SALES — Redemption.—Code, § 1885, authorizing one creditor to redeem from another creditor who has himself redeemed from the purchaser at execution sale or sale under a decree, authorizes such redemption from a redemptioner only by a judgment creditor, and no other class of creditors has the right to redeem from one who has acquired the property by redemption under the statute.—OWEN V. KILPATRICK, Ala., 11 South. Rep. 476.

76. LANDLORD AND TENANT.—Where the owner of a ranch "lets the same" by a covenant in writing for a term of years, for a share of the produce, with certain conditions as to the sale by the tenant of the stock and produce and division of the proceeds, the fact that such covenant constitutes a tenancy in common as to the produce does not destroy the relationship of landlord and tenant as to the land, and the lessor may sue for possession for condition broken.—JONES V. DURRER, Cal., 30 Pac. Rep. 1027.

77. LANDLORD AND TENANT—Defective Way.—Where a driveway from a lumber shed across a railroad track to the carriage way extending up and down a wharf was an appurtenance belonging exclusively to the shed and the land on which it stood, held, that it was the duty of the lessee of the land, who was owner of the shed, to maintain a reasonably safe means of access to the shed over the driveway.—ABBOTT V. JACKSON, Me., 24 Atl. Rep. 900.

78. LANDLORD AND TENANT—Rent.—A discharge of an insolvent debtor, who was lessee of real estate for a term of years, with covenant to pay rent at periods stated, is no bar to an action by the lessor on the covenant in the lease for rent accruing subsequent to the date of his insolvency.—RODICK V. BUNKER, Me., 24 Atl. Rep. 897.

79. LIMITATIONS—Partial Payments.—An indorsement on a promissory note of the value of a quantity of lumber delivered to the payee by the maker, made by express agreement of the parties four years after the delivery of the lumber, will be deemed a payment on the note, as of the date of the indorsement, which will prevent the operation of the statute of limitations, it not appearing that there was any agreement, express or implied, to appropriate the lumber to the payment of the note at the time of the delivery.—MANSON V. LANCEY, Me., 24 Atl. Rep. 880.

80. LIMITATION OF ACTIONS — Corporation.—The rule that a stockholder is not liable to suit for unpaid portions of the capital stock until an authorized call or assessment has been made upon the stock held by him applies only to a stockholder who has assigned his stock, and limitation begins to run in his favor, not from the date of the assignment, but from the maturity of the assessment.—PRIEST V. GLENN, U. S. C. C. of App. 51 Fed. Rep. 400.

81. MALICIOUS PROSECUTION—Probable Cause.—In an action for a malicious prosecution, evidence that the defendant, in commencing the prosecution complained of, acted in good faith, upon the advice of the trial justice, who issued a warrant upon his complaint, is incompetent to prove probable cause, or excuse the want of it.—FINN V. FRINK, Me., 24 Atl. Rep. 851.

82. MASTER AND SERVANT—Fellow-servant.—While a coal train of defendant railroad company, whose tracks ran over the docks of a coal company, was delivering coal to the latter company, a brakeman of the coal company, engaged in coupling cars of the train, was injured by the negligence of defendant's engineer: Held, that such an engineer was not a fellow employee of the injured brakeman, he not being under the power and direction of the coal company, engaged exclusively in doing its work or "lent" to it for the occasion.—CENTRAL RAILROAD OF NEW JERSEY V. STOERMER, U. S. C. C. of App., 51 Fed. Rep. 518.

83. MECHANIC'S LIEN.—The act of 1889, giving material-men a lien against the land of another when a contract exists with the owner of the land, or between the owner and the contractor, under whom the material-men claim, does not apply where a husband contracted in his own behalf, and not as agent for the wife, for the erection of a house on land standing in her name.—GROTH V. STAHL, Colo., 30 Pac. Rep. 1051.

84. MINES—Intersecting Veins.—Defendant conveyed a portion of a mining claim, of which he was in possession and claimed ownership, to plaintiff, and subsequently located the remaining portion of the claim at a date prior to a location by plaintiff of the portion conveyed to him. A vein running from defendant's claim intersected one of plaintiff's veins within his surface boundaries: Held, that plaintiff was entitled to all mineral at the point of intersection, since, as against plaintiff, defendant's claim was not a prior location, within Rev. St. U. S. § 2336, providing that all the mineral in the space of intersection of two veins shall belong to the prior location.—STINCHFIELD V. GILLIS, Cal., 30 Pac. Rep. 839.

85. MINING CLAIMS.—An alien who has expended time, money, and labor in exploring for and locating a mining claim on public lands, co-jointly with others, may hold his interest, or recover the same if deprived thereof, as against his co-locators, and as against all the world except the United States, though Rev. St. § 2319, confines the right of exploration, purchase, and occupation of unsurveyed mining lands to citizens of the United States, or persons who have declared their intention to become citizens.—BILLINGS V. ASPEN MINING & SMELTING CO., U. S. C. C. of App., 51 Fed. Rep. 338.

86. MORTGAGES.—If a mortgage is given to secure negotiable promissory notes, and the notes are transferred, the mortgagee, and all claiming under him, will hold the mortgaged property in trust for the holders of the notes.—STEWARD V. WELCH, Me., 24 Atl. Rep. 860.

87. MORTGAGES—Homestead.—Plaintiff agreed orally to sell to defendant certain lands, part of which plaintiff had filed upon under the "Homestead Act," but for which he had not yet made final proof or payment. Afterwards plaintiff conveyed to defendant all the lands except the homestead tract, and defendant executed to plaintiff a note and mortgage for a balance of the purchase money: Held, in an action to foreclose the mortgage, that the contract was entire, and, being void because it embraced the homestead lands, the mortgage executed in pursuance of it could not be enforced.—MOFFITT V. BULSON, Cal., 30 Pac. Rep. 1022.

88. MORTGAGES — Record — Fraud.—The mere withholding from the record of a mortgage given for full consideration, lest it might injure the credit of the mortgagor, is not sufficient evidence of an intent on the part of the mortgagee to hinder, delay, or defraud creditors of the mortgagor.—FLEMINGTON NAT. BANK V. JONES, N. J., 24 Atl. Rep. 928.

89. MORTGAGE—Subrogation.—One who acquired title to a tract of land by decree of a court, and was in possession, paid, in good faith, an existing incumbrance thereon. The decree was afterwards reversed on writ of error: Held, that the party in possession was entitled, in equity, in the circumstances stated in the opinion, to be subrogated to the rights of the holder of the incumbrance, and to hold possession as mortgagee until repayment of said outlay.—GOOCH V. BOTTS, Mo., 20 S. W. Rep. 192.

90. MUNICIPAL CORPORATION—Defective Sidewalk.—In an action against a city for personal injuries resulting

from a defective sidewalk, plaintiff need not allege or prove that the street had been used as a highway for the period of 10 years, as Pub. Laws 1887, providing that that act, requiring cities to keep highways in repair, shall not apply to highways which have not been in use for 10 years, provides, further, that nothing in that section shall exempt cities from keeping streets and sidewalks in a safe condition for public travel.—FULLER V. MAYOR, ETC., OF CITY OF JACKSON, Mich., 52 N. W. Rep. 1075.

91. MUNICIPAL CORPORATION—License.—By Const. art. 10, § 3, providing that "all taxes shall be uniform," and that they shall be levied and collected under "such regulations as shall secure a just valuation for taxation of all property, real and personal," a city which by its charter has the right to tax street cars, by license, to pay for the cost of police supervision, is prohibited from taxing the cars, under the power of license, for the purposes of municipal revenue.—DENVER CITY RY. CO. V. CITY OF DENVER, Colo., 30 Pac. Rep. 1048.

92. NATIONAL BANKS—Insolvency — Set-off.—The indorser of a note which is discounted by a national bank, and which matures after the bank becomes insolvent and a receiver is appointed, is entitled to set off against the note the amount of his deposits in the bank at the time of its failure.—YARDLEY V. CLOTHIER, U. S. C. C. of App., 51 Fed. Rep. 507.

93. NATIONAL BANKS—State Taxation.—Pub. St. Mass. ch. 13, §§ 8 10, provide that shares of stock in all banks, State and national, shall be taxed to the owners thereof, to be paid in the first instance by the bank itself, which, for reimbursement, shall have a lien on the shares and all the rights of the shareholders in the bank property: Held, that no suit for this tax can be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared; for, there being nothing from which the receiver can be reimbursed, the tax will fall upon the assets of the bank, which belong to its creditors, and thereby violate the rule that a State cannot tax the capital stock of a national bank.—CITY OF BOSTON V. BEAL, U. S. C. C. (Mass.), 51 Fed. Rep. 306.

94. NEGLIGENCE — Blasting. — Where the locality in which a person is blasting on his own land is not such as to render the blasting a nuisance and unlawful, he is not liable for injuries caused by rock thrown from the blast, unless he has been negligent in blasting.—KLEPSCH V. DONALD, Wash., 30 Pac. Rep. 991.

95. NEGLIGENCE—Defective Highway. — In an action against a town to recover for injuries received in consequence of a defect in the highway, it is incumbent on the plaintiff to prove that he was in the exercise of due care at the time the injury was received.—MOSHER V. INHABITANTS OF SPRINGFIELD, Me., 24 Atl. Rep 876.

96. NEGLIGENCE — Evidence. — In an action for personal injuries caused by defendant's negligence, the only question was whether or not a locomotive engine, which moved without human agency, and caused the injury, was in good repair at the time: Held, that evidence was inadmissible to show that other engines, steamed up, have moved without human agency, and independent of any defect discoverable by the witness.—HURD V. UNION PAC. RY. CO., Utah, 30 Pac. Rep. 982.

97. NEGLIGENCE— Respondeat Superior.— Where defendant canal company contracts with a third person for the repair of its canal, to be made with soil taken from plaintiff's land, the contract is in its nature injurious to plaintiff, and defendant is liable for the damages caused by its performance, under the doctrine of respondeat superior. — WILLIAMS V. FRESNO CANAL & IRRIGATION CO., Cal., 30 Pac. Rep. 961.

98. NEGLIGENCE OF FELLOW SERVANTS.—Comp. LAWS, §§ 2308-2310, provide that, when "any person" comes to his death by reason of the negligence, carelessness, or criminal action of any agent, officer, or other employee of a railroad company, his representative may recover from the company $5,000: Held, that the legislature did not intend to change the common-law rule which exempts a master from liability for the negligence of a fellow servant.—LUTZ V. ATLANTIC & PAC. R. CO., N. Mex., 30 Pac. Rep. 912.

99. NEW TRIAL.—A defendant, whose attorney withdrew his cross complaint and failed to ask for a continuance, or to be present at the trial, after consultation with, and with the consent of, defendant, cannot, by changing his attorney, obtain a new trial on the ground of accident or surprise, where no charge is made that the attorney was incompetent, unfaithful, or negligent.— FINCHER V. MALCOLMSON, Cal., 30 Pac. Rep. 835.

100. PAYMENT — Fraud and Duress. — Where one demands money under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat, expressed or implied, of resort to litigation to obtain it if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust.—PARKER V. LANCASTER, Me., 24 Atl. Rep. 952.

101. PRINCIPAL AND AGENT. — A plaintiff, having a right of action for the breach of a contract, may sue for the use of any person he may designate to take the proceeds of the action. When an agent has a contract on which he can maintain an action in his own name, he may sue for the use of his principal.—RICHMOND & D. R. CO. V. BEDELL, Ga., 15 S. E. Rep. 676.

102. PUBLIC LANDS — Military Land Warrant. — The location of a military warrant upon land which has already been reserved by act of congress for school purposes is void, and neither the locator nor his grantees can acquire any legal or equitable rights thereunder to the land.— DUNN V. BARNUM, U. S. C. C. of App., 51 Fed. Rep. 355.

103. PUBLIC LAND—Swamp Lands.—Const. art. 17, § 3, providing that State lands which are "suitable for cultivation" shall be granted only to actual settlers, applies to swamp lands granted as such to the State by congress, but which afterwards became dry and fit for cultivation.— GOLDBERG V. THOMPSON, Cal., 30 Pac. Rep. 1019.

104. REAL ESTATE AGENTS—Contract.—Where recovery of broker's commission is sought on a contract of employment in the sale of land, the contract need not describe the land specifically, if the terms of the employment can be made definite without it; but, where there is an attempt to limit the employment to certain property, it must appear that the property sold was within the description.—MAZE V. GORDON, Cal., 30 Pac. Rep. 962.

105. RAILROAD AID BONDS— Estoppel.—In an action by an innocent purchaser against a township on railway aid bonds, which on their face refer to the act authorizing their issuance and specifically recite the taking of each step required thereby, the township is estopped to allege invalidity of the bonds on any ground except that they were issued in violation of some constitutional or statutory requirement.—TP. OF WASHINGTON V. COLER, U. S. C. C. of App., 51 Fed. Rep. 362.

106. RAILROAD COMPANIES. — The construction and operation of a railway on and along a public road by a company having authority from the State so to do is not a use contemplated at the time of the dedication of such road, and the owner of the fee thereof, and of lands abutting thereon, may prevent any special damages by such use by resort to a court of equity, or he may redress the same in a court of law.— WESTERN RAILWAY OF ALABAMA V. ALABAMA G. T. R. CO., Ala., 11 South. Rep. 483.

107. RAILROAD COMPANIES—Bondholders.—The plaintiff town held about one twentieth of the bonded debt of a railroad, and a much less proportion of its stock. The defendant towns held the balance, and voted to sell the road. The plaintiff declined: Held, that it was the right of the majority to control, such action of the majority not being fraudulent, collusive, or op-

pressive.—INHABITANTS OF WALDOBOROUGH v. KNOX & L. R. Co., Me., 24 Atl. Rep. 942.

108. RAILROAD COMPANIES— Contract— Ultra Vires.—The general rule that a railroad company must itself exercise its powers and perform its public duties does not render *ultra vires* a contract by the Union Pacific Company, whereby, for 999 years, it let another company into the joint use and occupancy of its bridge across the Missouri river, and of its terminal facilities at Omaha, together with about seven miles of its track, when such joint use does not interfere with the present or prospective use thereof by the lessor, or with the discharge of the duties it owes to the government under the provisions of its charter.—UNION PAC. RY. CO. v. CHICAGO, R. I. & P. RY. CO., U. S. C. C. of App., 51 Fed. Rep. 309.

109. RAILROAD COMPANIES— Construction of Road on Street— Damages. — Comp. Laws, § 2665, subsec. 5, authorizing the construction of railroads along any street, avenue, or highway, does not deprive an abutting owner of the right to damages for such diversion of the street from its original purpose.—NEW MEXICAN R. Co. v. HENDRICKS, N. Mex., 30 Pac. Rep. 901.

110. SLANDER—Privilege.—When one church member is a witness on the trial of another before the proper church tribunal, a *bona fide* disclosure of all relevant facts is incumbent upon him as a private, moral duty; and if those facts necessarily involve misconduct, or even a crime, on the part of a person not a member of the church, the naming of such person, as a part of the relevant testimony of the witness, is within the protection of the privileged occasion.—ETCHISON v. PERGERSON, Ga., 15 S. E. Rep. 680.

111. SALE—Rescission—Mortgage.—Goods fraudulently purchased under circumstances which entitle the vendor to a rescission for fraud do not become the property of the purchaser, so as to enable him to mortgage them to an existing creditor as security for an antecedent debt, and thus create a mortgage lien superior to the title of the vendor, who, on discovery of the fraud, rescinds the sale and reclaims the goods, the mortgagee not paying anything nor parting with anything as a consideration for the mortgage, but the consideration being the antecedent debt only.—DINKLER v. POTTS, Ga., 15 S. E. Rep. 690.

112. SLANDER— Demurrer. — A complaint for slander charged the use of the following words in the sense indicated: "I can only regard her proposition (meaning the plaintiff) for money for the letters as a blackmailing scheme, pure and simple (meaning that plaintiff is guilty of the crime of concocting a blackmail or extortion scheme):" Held that, as the words were susceptible of the construction placed on them by the innuendo, the court, in considering a demurrer to the complaint, must accept that as the true meaning, though they were also susceptible of a different meaning.— MITCHELL v. SHARON, U. S. C. C. (Cal.), 51 Fed. Rep. 425.

113. TAXATION— Valuation and Listing.—In an action under the statute to recover taxes due a city or town is it not a defense that the assessors made only one valuation for each tax, State, county, and town, and blended together the several sums to be thus levied, making but one assessment for the whole.— CITY OF ROCKLAND v. ULMER, Me., 24 Atl. Rep. 949.

114. TAX SALE—Certificate.—The mere writing of his name by the purchaser on the back of a tax-sale certificate does not constitute an "indorsement," within Comp. Laws, § 2885, providing that a certificate of sale of land for taxes "shall be assignable by indorsement," since the certificate is not negotiable.—TERRITORY v. PEREA, N. Mex., 30 Pac. Rep. 928.

115. TOWNS—Torts of Officers.—It is settled law that when a public officer, in the line of his duty, does a public work within a town, for the public benefit or use, the town, in the absence of any directions to him, is not liable for his misconduct in such work, even though it appointed him, and is obliged to pay the cost of the work.—GODDARD v. INHABITANTS OF HARPSWELL, Me., 24 Atl. Rep. 958.

116. TRIAL—Competency of Juror.—A juror was related to the plaintiff within the fourth degree, and to the defendant within the fifth degree, according to the rules of the civil law. But neither the plaintiff nor the defendant had knowledge of this fact, nor was the juror made aware of it, until after the verdict: Held, that the juror was not "disinterested," and not a legal member of the panel, and that under our statutes the plaintiff is entitled to a new trial as a matter of law.—JEWELL v. JEWELL, Me., 24 Atl. Rep. 858.

117. TRUST — Laches.—The issuance of receipts and certificates of purchase of swamp lands belonging to a county, by the proper officers thereof, makes the county a trustee holding the legal title of the lands for the benefit of the purchaser, and laches cannot be imputed to the latter in respect to delay in obtaining a conveyance, until the county has repudiated the trust by some unequivocal act.—LEMOINE v. DUNKLIN COUNTY, U. S. C. C. of App., 51 Fed. Rep. 487.

118. TRUST AND TRUSTEE—Acceptance.—A stipulation, that the trustees of a certain fund, to be raised by subscription, should signify their acceptance of the trust in writing, is a condition precedent to their right to enforce such subscriptions.—WISWELL v. BRESNAHAN, Me., 24 Atl. Rep. 885.

119. VENDOR AND PURCHASER.—Where the owner of a farm leased it to his son at a yearly rent, payable in cash, and the son leased it to B for a share of the crops, a purchaser of the farm from the owner, "and the rents, issues, and profits thereof," subject to B's lease, is not entitled to such share of the crops reserved in the lease to B.—GARBER v. GIANELLA, Cal., 30 Pac. Rep. 841.

120. VENDOR AND VENDEE.—A plea by a vendee of realty, alleging fraud in the vendor, by which the vendee was induced to purchase the property at a price greatly in excess of its value at the time the plea was filed, but not alleging that the price was in excess of its value at the time of the contract, is no defense to an action brought upon one of the notes given for the purchase money.—KNOWLES v. ELYTON LAND CO., Ga., 15 S. E. Rep. 675.

121. WATER COMPANIES — Rents.—A regulation of a water company providing that takers of water shall be liable to pay rent for the whole year, whether they actually use it for that length of time or not, and to make payment yearly in advance, without special agreement, is unreasonable.—ROCKLAND WATER CO. v. ADAMS, Me., 24 Atl. Rep. 840.

122. WATERS—Irrigation.—The water of every natural stream in this State is the property of the public. By a diversion and use for irrigation, a priority of right to the use of the waters of the natural streams may be acquired. This priority is a property right, and, as such, is subject to sale and transfer.—FORT MORGAN LAND & CANAL CO. v. SOUTH PLATTE DITCH CO., Colo., 30 Pac. Rep. 1032.

123. WILL — Construction.—A bequest of personal property to two or more persons individually named as legatees, without words indicating the nature of the tenancy to be created thereby, will be construed as creating a tenancy in common, and not a joint tenancy. The law presumes that a tenancy in common was intended, unless a different intention of the testator be manifested by the terms of the will.—STETSON v. EASTMAN, Me., 24 Atl. Rep. 868.

124. WILLS—Construction.—A devise or gift may arise from implication, but, to justify the conclusion that a gift has been made in this way, the implication in favor of the gift must rest on a probability of an intention so strong that an intention contrary to that which is thus imputed to the testator cannot be supposed to have existed in his mind.—BARNARD v. BARLOW, N. J., 24 Atl. Rep. 912.

125. WILLS — Spendthrift Trust.—A testator may so give to his son for life the annual income of a trust estate that the life tenant cannot alienate or his creditors reach it.—ROBERTS v. STEVENS, Me., 24 Atl. Rep. 873.